Preserving America's Heritage

April 26, 2019

Ms. Joy Beasley
Acting Associate Director
Cultural Resources, Partnerships, and Science
Keeper of the National Register of Historic Places
National Park Service
1849 C Street NW
Washington, DC 20240

Re: Regulation Identifier Number 1024-AE49

Dear Ms. Beasley:

The Advisory Council on Historic Preservation (ACHP) is providing the following comments in response to the Department of the Interior, National Park Service's (NPS') proposed rule regarding the National Register of Historic Places (National Register). The ACHP is an independent federal agency that promotes the preservation, enhancement, and sustainable use of our nation's diverse historic resources, and advises the President and the Congress on national historic preservation policy. The ACHP oversees Section 106 of the National Historic Preservation Act (NHPA), which requires federal agencies to take into account the effects of their undertakings on historic properties and provide the ACHP a reasonable opportunity to comment. Pursuant to its authority under the NHPA, the ACHP promulgated government-wide regulations implementing Section 106, termed "Protection of Historic Properties," at 36 CFR Part 800.[1]

The ACHP has identified several points where the proposed rule is likely inconsistent with the plain language of the NHPA as well as the requirements of the Section 106 regulations, which could impede efficient implementation of the Section 106 review process. Further, the proposed rule likely conflicts with federal agencies' compliance with the requirement of Section 110 of the NHPA to establish a "preservation program for the identification, evaluation, and nomination to the National Register, and protection, of historic property."[2] Finally, the ACHP is concerned that the process for developing and publishing this proposed rule did not include, nor was it informed by, any coordination or consultation with affected federal agencies, states, Indian tribes, or Native Hawaiian organizations (NHOs). Our detailed comments are set forth below.

[1] 54 U.S.C. §§ 304108(a), 306108.
[2] 54 U.S.C. § 306102(a).

Determinations of Eligibility by the Keeper of the National Register

The proposed rule includes significant changes to the language of two sections in Part 63 that can impact the ability of federal agencies, State Historic Preservation Officers (SHPOs), Tribal Historic Preservation Officers (THPOs), and the ACHP to effectively carry out the requirements of Section 106 as implemented by 36 CFR Part 800. As specified in those regulations, after establishing that it has an undertaking that is subject to Section 106 review, a federal agency must determine the area of potential effects and identify historic properties that may be affected by the undertaking. These steps are done in consultation with the SHPO, THPO, Indian tribes, NHOs, and other consulting parties. Through its identification efforts, the federal agency must apply the National Register criteria to properties identified that have not been previously evaluated for National Register eligibility. If the federal agency official and the SHPO or THPO agree that any of the National Register criteria are met, the property shall be considered eligible for the National Register for Section 106 purposes. If the federal agency official and the SHPO or THPO do not agree, or if the ACHP or the Secretary of the Interior (a responsibility usually delegated to the Keeper of the National Register) request, the federal agency official must obtain a determination of eligibility from the Keeper pursuant to 36 CFR Part 63. If an Indian tribe or NHO that attaches religious and cultural significance to a property off tribal lands does not agree with the federal agency official's assessment, it may ask the ACHP to request the federal agency official to obtain a determination of eligibility from the Keeper.[3]

The introductory material in the *Federal Register* notice for the proposed rule implies that Section 106 disputes over the eligibility of a property are typically handled via compliance with 36 CFR § 63.4(c). However, we understand from past practice that Section 106 eligibility disputes are customarily handled pursuant to section 63.2, and not section 63.4(c). The process in section 63.4(c) is reserved for unusual, highly controversial situations. The proposal therefore adds to the confusion as to which section of Part 63 correlates with the dispute provision in the Section 106 regulations.

If the intent is that section 63.4(c) shall now apply to Section 106 eligibility disputes, then there are two points of conflict with the Section 106 regulations in the proposed changes. The first is the proposed change in section 63.4(c) that limits the situation in which the Keeper can make a determination of eligibility regarding a property under federal jurisdiction or control to only when the relevant federal agency and the SHPO request it. As noted above, under the Section 106 regulations, when a federal agency and a SHPO or THPO disagree over a property's eligibility, or if the ACHP or the Secretary of the Interior requests it, the federal agency is required to obtain a determination of eligibility from the Keeper, regardless of the location of the property. There has never been a requirement for federal agency (or SHPO) concurrence to submit such a request. This has been the case in every version of the Section 106 regulations, which were first published in 1974.[4] The 2016 amendments to the NHPA provide no mandate or authorization for such a change, nor does the *Federal Register* notice offer any other compelling rationale.

Second, the proposed rule deletes the sentence in the current regulations that states, "Such determinations may be made without a specific request from the Federal agency or, in effect, may reverse findings on eligibility made by a Federal agency and State Historic Preservation Officer." Deletion of this provision prohibits the Keeper from acting independently and circumscribes the Keeper's authority to make a determination regarding the eligibility of a property that is final and binding. This change would cause confusion as to how the Keeper makes the final decision regarding a property's eligibility for the National Register.

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[3] 36 CFR § 800.4(c)(1), (2).

[4] 36 CFR § 800.4(a)(2)(1974); 36 CFR § 800.4(a)(3)(1979); 36 CFR § 800.4(c)(4)(1986); 36 CFR § 800.4(c)(2)(1999); and 36 CFR § 800.4(c)(2)(2004)(present regulations).

It is important to note that a determination of the eligibility of a property for listing in the National Register is based solely on an assessment of the characteristics and significance of the property in accordance with the National Register criteria, along with its integrity to convey that significance. As clearly recognized by the NHPA and the authority granted to the Secretary of the Interior (and to the Keeper via delegation of that program) to promulgate the regulations for nominations and eligibility determinations,[5] the Keeper is the federal government's expert and ultimate authority on the application and interpretation of the National Register criteria. For Section 106 purposes, the ability of the Keeper to clearly and conclusively resolve disputes over eligibility upon referral from the federal agency, or based upon its own decision, is crucial to provide a way forward as to how that property should be considered in the Section 106 review process.

If the intent is to remain consistent in utilizing section 63.2 to address situations where there are disagreements over a property's eligibility, including in the context of Section 106, the proposed rule should clearly state that. In addition, there is a technical edit that is necessary. There is a typo in the current regulations. In section 63.2(c), there is a reference to a dispute process that is supposed to be provided in section 63.3(d). This should likely be a reference to section 63.2(d). The proposed rule should make a technical correction to fix this typo to clarify how a situation in which the federal agency and SHPO do not agree would be handled.

Finally, in regard to section 63.4(a), the *Federal Register* notice asked whether the Keeper should be able to make eligibility determinations for properties that do not meet the procedural requirements for listing. The ACHP believes that the Keeper should have this ability. Since an agency's request for a determination of eligibility is not subject to the same procedural steps as a nomination, the Keeper should be able to exercise her or his expertise in assessing the property's eligibility in this context.

Proposed Changes to Federal Nomination Process Conflict with Statutory Language

The proposed rule modifies the process for a federal agency to nominate properties on land under the jurisdiction or control of a federal agency in various places. As stated in the introductory material of the *Federal Register* notice, the intent for these changes was to implement the 2016 amendments to the NHPA. However, we believe these changes exceed the statutory language of the amendment and, in doing so, conflict with existing provisions of the NHPA.

Section 110 of the NHPA, 54 U.S.C. § 306102(a), (b)(1), requires federal agencies to identify, evaluate, and nominate historic properties under their jurisdiction or control. A preservation program under Section 110 that contains those elements is a statutory requirement for federal agencies, and efforts to carry it out make Section 106 reviews more efficient when historic properties have already been identified pursuant to Section 110. The proposed rule is not compatible with the federal agency's responsibility under Section 110, nor does it encourage federal agency compliance with Section 110.

As referenced in the 2016 amendments, section 302104(d)(2) of the NHPA sets forth the ability of any person or local government to appeal to the Secretary of the Interior "the failure of a nominating authority [including a federal agency] to nominate a property in accordance with this chapter." A plain language reading of the statute imposes no requirement that the federal agency first nominate the property then withdraw that nomination in order for this provision to apply. However, the proposed rule creates that scenario in the changes at section 60.12(b)(1). The proposed rule separates the appeal process for SHPO and Federal Preservation Officer (FPO) nominations, and the process for appealing a FPO's nomination, or lack thereof, is now limited to situations where the FPO actually completes the procedural steps to

[5] 54 U.S.C. § 302103.

nominate a property and then withdraws the nomination. This new requirement precludes the exercise of the existing statutory right of any person or local government to appeal a federal agency's lack of adherence to Section 110. This result could also create a potential bias against underrepresented groups who may be concerned with a federal agency's refusal to nominate properties of significance to them.

The proposed changes in Part 60 improperly restrict the ability of SHPOs and THPOs to nominate historic properties on land under the jurisdiction or control of federal agencies. Section 302104(c) of the NHPA, embodying language of the 2016 amendments, provides the process that federal agencies must follow to nominate properties. The amended law does not change SHPOs' or THPOs' nominating authority for properties under federal jurisdiction or control. The statutory provision simply directs federal agency actions and does not apply to the actions of other nominating authorities. It is specific to the federal agency, not the property's ownership status.

The proposed rule deletes section 60.6(y), which provides, "[w]ith regard to property under [f]ederal ownership or control, completed nomination forms shall be submitted to the Federal Preservation Officer for review and comment. The Federal Preservation Officer, may approve the nomination and forward it to the Keeper of the National Register of Historic Places...". If a FPO elects not to approve or forward the nomination, based on the existing language, the SHPO may still do so. Section 60.6 is the process for SHPO nominations, and it does not restrict the SHPO's ability to nominate a property based on location. Further, section 60.6(y) clearly indicates that there would be situations where the SHPO could nominate properties under federal ownership or control, and in those cases, the SHPO simply has to provide the FPO an opportunity to review and comment on the nomination. The FPO was never authorized to object to the nomination and the 2016 NHPA amendments did not change that. Excluding SHPOs from this role would also likely result in fewer properties under federal jurisdiction and control being nominated to the National Register regardless of merit. Such an outcome would contradict the spirit and intent of the NHPA and could also result in a lack of diverse properties being nominated.

The proposed changes create ambiguity in regard to the nomination of historic districts that may include privately owned property and land under the jurisdiction or control of a federal agency. It is not clear whether a SHPO could move forward with a nomination of a historic district in the case of federal agency inaction or even objection. This may jeopardize the possible listing of historic districts in which the private property owners support such a designation and dramatically change the longstanding and successful practice of formal National Register recognition of such districts. This in turn could seriously circumscribe the use of the federal Historic Tax Credit, which has been widely used to promote both historic preservation and community revitalization goals.

By limiting the nomination of properties under federal jurisdiction or control to only those situations where the federal agency does the nomination, the proposed rule overly restricts which nominating authority may nominate properties and appears to equate a federal agency with a private property owner in contrast to its stewardship responsibilities under Section 110. The federal agency is the steward of the public lands under its jurisdiction or control, and many Indian tribes, NHOs, local communities, and private citizens attach significance to historic properties located on public lands. Combining these changes with the changes to the appeal process for federal agency nominations (or lack thereof), the proposed rule undermines the intent and effectiveness of Section 110 and is inconsistent with both the underlying policies and express statutory language of the NHPA. We recommend the proposed rule be revised to remove the restriction on nominations for properties under federal control or jurisdiction, reinsert section 60.6(y) with appropriate modification to require federal agencies to follow the procedural requirements of the 2016 amendments as necessary, and bring the appeal process back into alignment with the intent and language of the NHPA.

Uncertainty in Landowner Requirements for Objection to Listing

The proposed rule inserts a new criterion for SHPOs to consider in assessing the objections of multiple property owners to the listing of a historic property in the National Register. Section 302105 of the NHPA sets forth owner participation in the nomination process. In section 302105(b), it states that in the case of a historic district, if a "majority of the owners of privately owned properties within the district" object to inclusion or designation, the property shall not be included on the National Register or designated as a National Historic Landmark until the objection is withdrawn. The proposed rule inserts in sections 60.6 and 60.10, "…for a district or single property with multiple owners, the majority of owners *or the owners of a majority of the land area*". (emphasis added) This provision is inconsistent with the statutory language of the NHPA on its face.

Even if it were legally supportable, the provision is administratively unworkable. The proposed rule introduces a new term, "land area," that is undefined and does not appear in the NHPA, imposes an unmanageable burden on the SHPO, and would create an unfunded mandate for state government to determine the size of land areas to meet the requirements of the revised regulation.

On a separate note, the NPS should take the occasion of revising Part 63 to address an abusive practice that seriously threatens the integrity of the National Register process. The ACHP brought to the attention of the NPS a recent situation in Eastmoreland, Oregon, in which five private property owners divided their ownership interests into 1,000 trusts per owner solely for the purpose of preventing a historic district from being listed on the National Register. In the ACHP's June 2018 letter to the Acting Director of the NPS, we urged the NPS to not accept this approach to artificially inflate the number of objecting property owners and stated:

> The intent of this provision [to address owner participation in the nomination process] was to allow legitimate property owners a voice in listing decisions, reflecting the democratic ideal that the desires of a majority of the property owners in a historic district should determine whether the district would be formally listed on the National Register. For nearly four decades the owner objection provision in the law has worked effectively to find balance and achieve listing decisions that were in accordance with national policy and the will of the majority of affected citizens.

The proposed rule would not seem to resolve the situation that occurred in Eastmoreland. The ACHP urges the NPS take this opportunity to address it.

Process for Developing the Proposed Rule

Prior to publishing this notice of proposed rulemaking, the NPS did not consult or coordinate with other federal agencies or states that would be directly affected by the proposed rule change, nor did the NPS conduct any consultation with Indian tribes or NHOs. While this proposed rule has been determined to not be significant under Executive Order 12866 and thereby did not undergo interagency review prior to publication, its provisions will have definite impact on how federal agencies manage property under their jurisdiction and control. Further, the publication of the proposed rule did not meet the directive of Executive Order 13563, which states:

> Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.

It is essential that development of the final rule be coordinated with the ACHP, affected federal agencies, and states, and we urge the NPS to engage in such consultation and coordination before finalizing the rule.

We are also concerned that the NPS determined that tribal consultation was not required prior to publishing this notice of proposed rulemaking because they believed the rule would not have a substantial direct effect on federally recognized Indian tribes per Executive Order 13175. Indian tribes and NHOs ascribe traditional religious and cultural significance to a large number of historic properties located on land under federal jurisdiction or control and have a direct interest in the identification and protection of them. It is quite likely that the majority of such sites have not been evaluated for National Register status and certainly have not been listed on the National Register. How federal agencies nominate such properties to the National Register and how determinations of eligibility are made on lands under federal jurisdiction or control has a direct bearing on those interests and how Indian tribes and NHOs express their views on their significance and status. The ACHP urges the NPS to engage in effective government-to-government consultation before it finalizes the rule. Considering the Department of the Interior's trust responsibility and the clear, serious implications of this rule for Indian tribes and NHOs seeking to protect historic properties of significance to them on federal lands, the NPS should initiate consultation immediately.

It is also important to recognize the requirement in the NHPA for the Secretary of the Interior to consult with national historical and archaeological associations in promulgating regulations for nominating properties to the National Register, considering appeals from any failure or refusal by a nominating authority to nominate, and making eligibility determinations.[6] We do not believe that publication of an NPRM constitutes the consultation envisioned by this specific provision of the NHPA.

The important interplay between the National Register regulations and the Section 106 regulations underscores the importance of close coordination with the ACHP as your efforts to amend these regulations continue. The ACHP therefore appreciates the opportunity to provide its comments on the proposed rule and requests that the NPS consult directly with the ACHP as it moves forward to finalize the proposed rule. Please do not hesitate to contact me directly at (202) 517-0200 or by email at jfowler@achp.gov.

Sincerely,

John M. Fowler
Executive Director

[6] 54 U.S.C. § 302103(2).